
April 2000

BID PROTESTS

Characteristics of Cases Filed in Federal Courts

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United States General Accounting Office
Washington, D.C. 20548

General Government Division

B-282743

April 17, 2000

The Honorable Fred Thompson
Chairman
The Honorable Joseph Lieberman
Ranking Minority Member
Committee on Governmental Affairs
United States Senate

The Honorable John Warner
Chairman
The Honorable Carl Levin
Ranking Minority Member
Committee on Armed Services
United States Senate

The Honorable Dan Burton
Chairman
The Honorable Henry Waxman
Ranking Minority Member
Committee on Government Reform
House of Representatives

The Honorable Floyd Spence
Chairman
The Honorable Ike Skelton
Ranking Minority Member
Committee on Armed Services
House of Representatives

Currently, an eligible person or business may file a protest challenging a federal contract award or the procedure by which the offers were solicited. Protests may be filed before or after the contract is awarded. Under the Administrative Dispute Resolution Act (ADRA) of 1996,¹ the 94 U.S. district courts and the United States Court of Federal Claims (COFC)² have the same jurisdiction to decide bid protest cases. In addition, district

¹ P. L. 104-320, see 28 U.S.C. 1491(b).

² The 94 district courts are located in the 50 states; the District of Columbia; the Commonwealth of Puerto Rico; and the U.S. territories of the Virgin Islands, Guam, and the Northern Mariana Islands. COFC is located in Washington, D.C.

courts and COFC may grant any relief that the court considers appropriate, except that monetary relief is limited to bid preparation and proposal costs. Under ADRA, district court jurisdiction for bid protest cases is scheduled to expire on January 1, 2001. The expiration of district court jurisdiction is supported by some groups and opposed by others.

In response to ADRA, and as agreed with the committees of jurisdiction, this report reviews the cases, particularly small business cases, that have been filed in district courts and COFC since ADRA took effect on December 31, 1996. Our objectives were to (1) identify the number of bid protest cases filed in the U.S. district courts and COFC between January 1, 1997, and April 30, 1999, that were filed by small businesses, the type of agencies involved (civilian or defense), and the amount of the procurement at issue; (2) identify the perceived advantages and disadvantages, particularly for small businesses, of filing bid protest cases in each judicial forum, the district courts and COFC; and (3) obtain available data on the characteristics of district court and COFC bid protest cases, particularly those filed by small businesses, that could be used to assess these perceived advantages and disadvantages.

As agreed with the committees of jurisdiction, we focused our analysis on the characteristics of the bid protest cases filed since concurrent jurisdiction became effective, including the characteristics that may be relevant to assessing the arguments in favor of and opposition to retaining district court jurisdiction. However, our analysis did not address the policy arguments in favor of or opposition to retaining district court jurisdiction—for example, whether it was desirable to retain the district courts as an Article III judicial forum (one in which judges have life tenure) for bid protest cases or to have a more uniform body of procurement case law.³

Results in Brief

Between January 1, 1997, and April 30, 1999, at least 66 bid protest cases were filed in U.S. district courts.⁴ During the period January 1, 1997,

³ Although COFC is an Article I court—one in which judges are appointed for a specific number of years—appeals of COFC decisions are heard by the U.S. Court of Appeals for the Federal Circuit, which is an Article III court—one in which judges are appointed for life. Article I and Article III refer to the articles of the U.S. Constitution under which the courts were created.

⁴ Although we began with a list of about 94 potential bid protest cases, we did not receive the case files for 10 cases. A review of the remaining 84 case files revealed that 19 of these cases were duplicates or did not involve bid protests. Among the 10 cases we did not receive was a sealed case. However, we were able to review this case file at the district court, and we counted it among the 66 bid protest cases we reviewed.

through August 1, 1999, 118 bid protest cases were filed in COFC.⁵ On the basis of available data, using an inclusive definition of small business,⁶ we found that about half of the cases in both district courts (33 of 66) and COFC (61 of 118) were filed by small businesses. Defense procurements were the subject of the majority of small business protests in both district courts (19 of 33) and COFC (40 of 61). For those cases for which the value of the procurement was available, the majority of the small business procurements in district courts (23 of 27) and COFC (27 of 49) were for \$10 million or less.

Those who support the retention of district court jurisdiction for bid protest cases assert that (1) requiring small businesses to file all their protests in COFC, rather than having the option of filing in their local district courts, could make it more expensive for all businesses, particularly small businesses, to file bid protest cases; (2) district courts provide an Article III forum (one in which judges have life tenure) for bid protest issues; (3) COFC judges may be unable to travel on short notice to conduct hearings in bid protest cases; and (4) jurisdictional problems may arise from the sunseting of district court jurisdiction. Those who support COFC as the sole judicial forum for bid protest cases assert that (1) consolidating jurisdiction in COFC will provide the opportunity to develop more uniform procurement case law than is possible among 94 district courts; (2) a single judicial forum for bid protests will eliminate forum shopping (litigants seeking the most favorable judicial forum in which to file their cases); (3) COFC has broad authority to hear issues related to bid protests; (4) COFC judges can travel as necessary. The case data available provide a limited basis for assessing the perceived advantages and disadvantages of retaining district court jurisdiction for bid protest cases; therefore, we draw no conclusions based on these data.

Proponents of retaining district court jurisdiction assert that small businesses may be able to reduce the costs of filing a protest case in federal court by filing in their local district court using counsel from those local districts. Requiring small businesses to file all their judicial protest cases with COFC could raise their protest costs, perhaps prohibitively. We found that more small businesses filed in COFC (61 cases) than filed in district courts (33 cases). Of the 33 small business cases filed in district

⁵ Because COFC tracks bid protest cases as a separate category, we were able to obtain more recent data for COFC from the COFC Clerk of Court.

⁶ We considered a bid protester to be a small business if (1) the protester was identified as a small business in the case files, (2) the attorney for the protester indicated that the protester was a small business, or (3) the protester was registered as a small business with the Small Business Administration.

courts, 18 were filed in the protesters' local district courts. All but 3 of these 18 cases used legal counsel from outside the Washington, D.C., area.⁷ However, the legal counsel used were not necessarily located in the districts in which the cases were filed. Of the 15 small business cases that were not filed in the protester's home district, 12 were filed in the D.C. district, and 9 of the 15 cases used counsel from the Washington, D.C., area. In COFC, 15 of the 61 small business cases were filed by counsel located outside the Washington, D.C., area. We had no data on whether the protesters' case costs, including attorney costs, were more or less in those cases in which they filed in their local district courts or filed in COFC and used non-D.C. area counsel.

With regard to potential jurisdictional issues associated with bid protest cases, we found that the legal issues raised in the bid protest cases filed in district courts and COFC fell into the same general categories. In both forums, the issue raised most frequently was the propriety of agency evaluation of proposals. However, COFC did not accept jurisdiction under ADRA in every bid protest case filed in COFC. For example, COFC transferred one case to district court for lack of jurisdiction; and in another case, the U.S. Court of Appeals for the Federal Circuit reversed COFC's ruling that it did not have jurisdiction under ADRA.

With regard to COFC judges ability to travel for bid protest cases, we found that COFC judges' had traveled to hold hearings in two bid protest cases between January 1, 1997, and August 1, 1999. The Chief Judge stated that COFC judges could travel as necessary.

In both district courts and COFC, the results of bid protests were mixed. It was not clear that small businesses were more likely to prevail in district courts than COFC. The courts usually denied injunctive relief to protesters regardless of whether they were small businesses or not. However, in some cases the government voluntarily agreed to stay the performance of its contract until the court ruled. In 30 district court cases and 29 COFC cases, the courts dismissed the cases on the voluntary motion of the protester or the protester and government jointly. In some cases the voluntary dismissal was because the parties had reached a settlement that responded, at least in part, to the protester's claims. In actions other than granting motions for voluntary dismissal, the courts generally ruled against the protester, with only one district court ruling in the protester's favor—a

⁷ Where the attorney's firm had more than one office location, we used the office address of the attorney representing the protester.

decision that was reversed on appeal. COFC ruled in favor of the protestor in 19 cases, including 11 small business cases.

Background

Currently, an eligible person or business may file a protest challenging a federal contract award and the procedure by which the contract offers were solicited in their choice of four forums: (1) the agency whose procurement procedures are being challenged, (2) the U.S. General Accounting Office (GAO), (3) U.S. district court, (4) or COFC. Agency actions taken pursuant to GAO decisions may be reviewed by the U.S. district courts or COFC.

Few bid protest cases were heard in federal district courts prior to 1970, principally because district court jurisdiction over such cases was not clearly established. In 1970 the U.S. Court of Appeals for the District of Columbia Circuit ruled that challenges to contract awards could be filed in district courts under the provisions of the Administrative Procedure Act.⁸

In 1982, Congress authorized COFC to grant equitable relief, including injunctive relief, in preaward protests—that is, cases filed prior to the time the contract was awarded.⁹ This statute also granted COFC “exclusive jurisdiction” to grant equitable relief in “any contract claim brought before the contract is awarded.” COFC did not have authority to hear postaward protests.

ADRA provided that effective December 31, 1996, U.S. district courts and COFC would have concurrent jurisdiction for federal bid protest cases—whether filed before or after the agency awarded the contract.¹⁰ The act also mandated that each court review such cases using the standards applicable under the Administrative Procedure Act—the standards that had been applied by the district courts since 1970. Under ADRA, district courts and COFC may award any relief that the court considers appropriate, except that monetary relief is limited to bid preparation and proposal costs. ADRA also provided that federal district court jurisdiction for bid protest cases would expire on January 1, 2001, unless extended by Congress prior to that date.

⁸ Scanwell Laboratories, Inc. v. Shaffer, 424 F.2d 859 (D.C. Cir. 1970).

⁹ Federal Courts Improvement Act of 1982, P.L. 97-164.

¹⁰ Specifically, the concurrent jurisdiction covers “an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or proposed procurement.” (28 U.S.C. 1491(b)(1)).

Scope and Methodology

In response to ADRA, and as agreed with the committees of jurisdiction, our objectives were to (1) identify the number of bid protest cases filed in the U.S. district courts and COFC between January 1, 1997, and April 30, 1999, that were filed by small businesses, the type of agencies involved (civilian or defense), and the amount of the procurement at issue; (2) identify the perceived advantages and disadvantages, particularly for small businesses, of filing bid protest cases in each judicial forum—the district courts and COFC; and (3) obtain and review available data on the characteristics of bid protest cases, particularly those filed by small businesses, that could be used to assess these perceived advantages and disadvantages.

We used several sources of information to identify bid protest cases. COFC provided a list of bid protest cases filed in COFC from January 29, 1997, through August 1, 1999.¹¹ Because district courts do not track bid protest cases as a separate civil case category, we used a variety of sources to identify potential district court cases. These included data from the Department of Justice, American Bar Association, other sources recommended by both, and district court clerks of court. Because there is no definitive list of district court bid protest cases, it is possible that our list of such cases is incomplete. To identify the perceived advantages and disadvantages of permitting district court jurisdiction to expire, we met with representatives from bar associations, contractor associations, other interested groups, and federal agencies; reviewed documents these groups provided; and reviewed the legislative history of ADRA. The COFC Clerk of Court provided a list of 118 bid protest cases—104 during our initial review and 14 additional cases identified during the agency comment period. Our final report includes all 118 cases.

For those potential bid protest cases identified, we obtained copies of documents from the case files from the U.S. district courts or COFC and used a data collection instrument to record a variety of information about each case. We were unable to obtain these case file materials in 10 of the 94 potential district court cases identified.¹² Complaints in 36 of 118 COFC cases were sealed, and in 18 of these 36 cases the complete case file was sealed. Moreover, incomplete or missing data precluded us from determining with certainty how many of the companies that filed bid protest cases in either the district courts or COFC were small businesses. Our analysis of the potential advantages and disadvantages was based on

¹¹ No bid protest cases were filed in COFC between January 1, 1997, and January 28, 1997.

¹² Among these 10 cases was a sealed case that we were permitted to review, but not copy, at the clerk of court's office.

an analysis of the data available in the case files of the bid protest cases we identified and attorney interviews. Where possible, we conducted telephone interviews with the attorneys representing the parties in each case to discuss their views regarding the reasons they chose to file in district court or COFC and the advantages and disadvantages of each judicial forum. We also discussed additional information on the dollar amount of the procurement at issue and whether the protester was a small business. For some cases the attorneys for one or more parties in the case did not wish to discuss the case. Due to these data limitations, we cannot generalize to all bid protest cases filed during the period of our review. Additional details on our objectives, scope, and methodology are found in appendix I.

We did our work in Washington, D.C., and Los Angeles, CA, between March 1999 and January 2000 in accordance with generally accepted government auditing standards. We requested comments from the Public Contract Law Section of the American Bar Association, the Federal Bar Association, the Secretary of Defense, the Attorney General, and the Chief Judge of COFC, and their comments are discussed at the end of the letter.

Characteristics of Bid Protest Cases Filed Between January 1, 1997, and August 1, 1999

We identified a total of 184 bid protest cases filed in the U.S. district courts and COFC since January 1, 1997—66 district court cases in 31 separate districts (through April 30, 1999) and 118 COFC cases (through August 1, 1999). Of this total, 52 of the district court cases had been closed by August 1, 1999; and 111 of the COFC cases had been closed by January 18, 2000. (We were able to continually update our data for COFC cases during our review.) COFC separately tracks bid protest cases, but district courts do not. The protest cases we reviewed are listed in appendixes II (district court) and III (COFC).

We reviewed the case files in each of the identified district court cases and in each of the unsealed COFC cases.¹³ Table 1 shows the basic characteristics of the 184 bid protest cases we reviewed. One of the cases was filed in COFC, which maintained that it did not have jurisdiction and transferred the case to district court. Another case was filed first in district court and then in COFC, which dismissed the case because it was pending in district court. We counted both of these cases as filings in each judicial forum. In addition, one protester filed two separate cases in the same district court involving a single solicitation, and another protester filed two

¹³ The district court permitted us access to the single sealed district court case. Information for this case is aggregated with the data for all other district court cases.

separate cases in different district courts involving the same solicitation. We counted these as four separate filings.

Complaints were sealed in 36 of the 118 COFC cases, and the entire file was sealed in 18 of these 36 cases. For these 18 cases, no case details were available in the case files, except the docket sheet. Consequently, the COFC data shown in table 1 are based on the 100 unsealed cases we reviewed, case file data available in those 36 cases in which only the complaint was sealed, and data from attorney interviews on sealed cases.

Table 1: Characteristics of Bid Protest Cases Filed in the U.S. District Courts and Court of Federal Claims During the Period of Our Review

Case characteristic ^a	U.S. District Courts		COFC	
	Total cases	Small business cases ^b	Total cases	Small business cases ^b
Total cases filed	66	33	118	61
Preaward cases	10	2	26	12
Postaward cases	56	31	78	44
Total cases under seal	1	1	18	5
Total cases closed^c	52	29	111	58
Type of agency procurement:				
Civil	35	13	32	21
Defense	29	19	69	40
Both ^d	2	1	0	0
Dollar range of procurement at issue:^e				
Less than \$1,000,000	8	8	9	7
\$1,000,000 to \$10,000,000	20	15	29	20
\$10,000,001 to \$50,000,000	10	3	37	19
\$50,000,001 to \$100,000,000	1	0	18	2
\$100,000,001 to \$500,000,000	3	0	5	1
\$500,000,001 to \$1 billion	1	0	1	0
More than \$1 billion	2	1	1	0

^aThe numbers in the table include data from unsealed cases; any data available for sealed cases (e.g., docket sheets); and information from attorney interviews (e.g., whether protester was small business).

^bFor 9 of the 66 district court cases it was not clear if the case was filed by a small business. For 5 of the 118 COFC cases, we could not determine from the case files or interviews whether the complaint was filed by a small business.

^cTotals as of August 1, 1999, for district court cases and January 18, 2000, for COFC cases.

^dTwo cases involved both defense and civilian agency defendants.

^eActual or estimated amount available for 45 of 66 district court cases and 100 of 118 COFC cases. For a number of cases the amount of the procurement is based on information from attorney interviews.

Source: GAO analysis of district court and COFC case files and data from attorney interviews.

More total bid protest cases, and more small business bid protest cases, were filed in COFC than were filed in district courts. On the basis of available data, we identified 33 district court cases and 61 COFC cases that were filed by small businesses. We used an inclusive definition of small business. We included a protester as a small business if (1) the protester was identified as a small business in the case files, (2) the attorney for the protester indicated that the protester was a small business, or (3) the protester was registered as a small business with the Small Business Administration.

Ten district court and 26 COFC cases involved preaward protests. The district court cases were divided almost evenly between defense (29) and civilian (35) procurements, and 69 of 100 unsealed COFC cases involved defense procurements. Two of the district court cases included both defense and civilian agency defendants.

In both the district courts and COFC, the amount of the procurement at issue varied widely. The amounts ranged from about \$100,000 to about \$10 billion in the 45 district court cases for which data were available. For the 100 COFC cases for which data were available, the amounts ranged from about \$93,000 to about \$2.7 billion. Whether grouped by total case filings or small business case filings, the amount of the procurement at issue was generally somewhat larger in COFC than in district court cases. About 11 of 45 district court cases involved procurements of no more than \$1 million, and 38 of 45 district court cases involved procurements of no more than \$50 million. In COFC, 9 of 100 cases involved procurements of no more than \$1 million; 75 cases involved procurements of no more than \$50 million. In COFC, 18 cases involved procurements of more than \$50 million but no more than \$100 million; one district court case fell within this range.

Perceived Advantages and Disadvantages of Permitting District Court Jurisdiction to Expire

Those who believe that Congress should not permit district court bid protest case jurisdiction to expire believe that district courts offer advantages that COFC does not. Similarly, those who believe that COFC should have sole judicial jurisdiction over such cases believe that COFC offers certain advantages that district courts do not.

Arguments in favor of retaining district court jurisdiction over bid protest cases include the following:

- It can be less expensive for small businesses to file bid protest cases in their local district courts. Requiring that all protest cases filed in federal court be filed with COFC in Washington, D.C., raises the cost for all protesters, but especially small businesses. For some small businesses,

this additional cost may be prohibitive. Proponents state that increased costs could result from (1) travel costs for local counsel to travel to Washington, D.C., for COFC hearings; or (2) the cost of hiring D.C. area counsel, whose rates may be higher than those of local counsel in the district where the protester is located.

- Although COFC has authority to travel to hear bid protest cases, this is not a realistic alternative to filing in local district courts. Those filing bid protest cases generally seek quick action from the courts, and it would be difficult for COFC judges to travel on short notice—for example, to preside over hearings for temporary restraining orders.
- COFC is an Article I, not Article III,¹⁴ court (that is, COFC judges do not have life tenure) and eliminating district court jurisdiction would remove all Article III trial court jurisdiction for bid protest challenges.
- Given the broad jurisdiction granted under ADRA—e.g., any objection by an interested party to an alleged violation of statute or regulation in connection with a procurement or proposed procurement—the sunset of district court jurisdiction has the potential to raise numerous jurisdictional problems.

Arguments in favor of consolidating judicial bid protest jurisdiction in COFC include:

- It would foster a uniform body of law in bid protest cases. A single court, COFC, would decide bid protest cases; and a single court of appeals, the U.S. Court of Appeals for the Federal Circuit, would hear appeals from COFC. In contrast, there are 94 district courts and 12 circuit courts of appeals that hear appeals from district court decisions.¹⁵ Thus, it is possible to have conflicting interpretations of federal procurement law among the 94 districts and 12 circuit courts of appeals.
- It would eliminate forum shopping whereby the protester seeks to select a district court that may best serve its interest.

¹⁴ This term refers to Article III of the U.S. Constitution. Judges appointed under Article III are appointed to lifetime appointments and may be removed from office only through the impeachment process. Judges appointed under Article I, such as COFC judges, are appointed for a specific number of years, such as 15 years.

¹⁵ District courts are organized into 12 geographic circuits, with a court of appeals for each circuit. Each court of appeals hears appeals from the district courts within its circuit. For example, the Third Circuit Court of Appeals hears cases from district courts in Delaware, Pennsylvania, New Jersey, and the U.S. Virgin Islands.

- COFC can travel to hold hearings throughout the nation, if needed.

Some of the arguments for and against retaining district court jurisdiction are policy arguments that cannot be addressed using data from the case files. Examples would include whether it is desirable to retain an Article III forum for bid protest cases or whether it is desirable to have a more uniform body of procurement case law.

However, data from the cases may shed some light on some of the other arguments. In reviewing the data available on these potential advantages and disadvantages, we focused principally on data that could be obtained from the case files regarding the characteristics of the bid protest cases filed in district courts and COFC since January 1, 1997. This included the (1) number of cases in district courts and COFC that were filed by small businesses, (2) the dollar amount of the procurement at issue, (3) the number of cases small businesses filed in their local district courts, (4) the number of cases in which small businesses used local legal counsel, (5) the legal issues raised in district court and COFC cases, and (6) the general outcomes of small business protest cases filed in district courts and COFC. We supplemented our case file reviews with attorney interviews. However, these data provide a limited basis for assessing the advantages and disadvantages of retaining district court jurisdiction for bid protest cases; therefore, we draw no conclusions based on these data.

Case Data on Small Business Protesters

Proponents of retaining district court jurisdiction assert that eliminating the jurisdiction will raise costs for companies filing bid protest cases. This would be especially significant for small businesses with limited resources that are located outside the Washington, D.C., area. Such businesses would no longer be able to file cases in the districts in which they are located. Proponents state that it is usually less expensive for small businesses not located in the Washington, D.C., area to file their cases in their local district courts using local counsel. Such counsel, it is argued, would usually be less expensive than Washington, D.C., area counsel.

Small Business Filings Were Split Between District Courts and COFC

Although we do not know why each case was filed in a particular district court or COFC, we found that more small business cases were filed in COFC than in district courts. About half of the total bid protest cases we reviewed in both COFC (61 of 118) and district courts (33 of 66) were filed by small businesses. As shown in table 2, about half of all district court bid protest cases (31 of 66) and about half of district court small business cases (15 of 33) were filed in just two districts—D.C. and Eastern Virginia. The Eastern Virginia district is adjacent to the D.C. district; three of the

four cases filed in that district were filed in Alexandria, VA, directly across the river from Washington, D.C.¹⁶

Table 2: Use of Local and D.C. Area Counsel in District Court Bid Protest Cases Filed Between January 1, 1997, and April 30, 1999

	Total cases	Small business cases
Cases filed in D.C. or Eastern Virginia districts		
Filed by D.C. area-counsel ^a	31	15
Filed by counsel located outside D.C. area	27	11
Cases filed in other districts		
Filed by D.C.-area counsel	4	4
Filed by counsel located outside D.C. area	35	18
	5	1
	30	17

^aWe defined D.C. area counsel as those whose office addresses were in D.C. or the adjacent Virginia and Maryland counties. Where the attorney's firm had more than one office location, we used the office address of the attorney representing the protester.

Source: GAO analysis of bid protest case files.

Protesters Who Filed Locally Generally Used Non-D.C.-Area Counsel

Of the 33 district court small business cases we identified, 18 were filed in the protester's local (or home) district, including 3 that were filed in the D.C. or Eastern Virginia districts. In all but 3 of these 18 cases, the protester used counsel from outside the Washington, D.C., area. However, the counsel used was not necessarily located in the districts in which the cases were filed. For example, a case filed in California used counsel from D.C. Of the 15 small business cases that were not filed in the protester's home district, 12 were filed in the D.C. district, and 9 used counsel from the D.C. area. The remaining three cases were filed in the districts of Utah, Northern Illinois, and Southern New York, respectively.

We found that 25 of 117 COFC cases were filed by counsel outside the Washington, D.C., area.¹⁷ Of the 61 COFC cases filed by small businesses, 15 were filed by counsel outside the Washington, D.C., area. We had no data on whether the protesters' case costs, including attorney costs, were more or less in those cases in which protesters filed in their local district courts or COFC and used non-D.C.-area counsel.

Reasons for Attorneys' Choice of Judicial Forum Varied Widely

We interviewed 27 attorneys who represented plaintiffs in 28 of 66 district cases and 70 attorneys who represented plaintiffs in 104 of 118 bid protest cases. Some attorneys did not wish to discuss their cases. The attorneys' reasons for their choice of judicial forum varied widely. For the 27

¹⁶ Department of Defense headquarters (the Pentagon) is located in the Eastern District of Virginia. The single Eastern District of Virginia bid protest case not filed in Alexandria was filed in Norfolk, Virginia.

¹⁷ Data were not available for one case.

attorneys who filed in district courts, the reasons offered most frequently for choosing district court were cost considerations (eight), time (seven) and familiarity with the district court (six). Among other reasons mentioned were the proximity of the district court; the COFC's lack of jurisdiction over a case; the district court offered greater opportunity for discovery and injunctive relief; and fairness.

Attorney reasons for filing in COFC were too varied to be categorized. Among the reasons mentioned were that COFC had more expertise in complex procurement cases; COFC can move cases more quickly than district courts, particularly compared to district courts with heavy criminal caseloads; COFC has issued a large number of published opinions compared to district courts; and there is less predictability in district court outcomes. However, 45 of the 70 attorneys interviewed said they favored retaining district court jurisdiction, believing that a choice of forum was useful and desirable.

Legal Issues Raised in Bid Protest Cases Reviewed

We reviewed the legal issues in the 66 district court and 100 unsealed COFC cases (see app. IV). Our analysis was based on a review of documents in the court case files. We found that the legal issues raised in both forums fell into the same general categories. In both the district court and COFC cases, the issue raised most frequently was the propriety of agency evaluation of proposals.

Proponents of retaining district court jurisdiction state that (1) the expiration of district court jurisdiction under ADRA may create jurisdictional questions that could require further litigation to clarify; and (2) if COFC declined jurisdiction, it is possible that some issues could not be raised in any other court.

With regard to jurisdictional issues, COFC held in two cases, for example, that it did not have jurisdiction to hear the dispute under ADRA. In one case, COFC held that it lacked jurisdiction over a maritime bid protest action and transferred the case to the district court for D.C.¹⁸ COFC indicated that although it maintains concurrent jurisdiction with the district courts to consider bid protest actions, jurisdiction over matters arising in admiralty, including maritime contracts, has traditionally been with the federal district courts. In the other case, the U.S. Court of Appeals for the Federal Circuit reversed a COFC determination that it did not have jurisdiction to hear a challenge to an agency's determination to proceed

¹⁸ Bay Ship Management, Inc. v. United States, 43 Fed.Cl. 535 (1999).

with contract award or performance in the face of a GAO protest, under 31 U.S.C. 3553(c)(1).¹⁹

Case Outcomes in District Courts and COFC Generally Similar

We also examined the outcomes of district court and COFC cases to examine the outcomes for small businesses in each judicial forum. The results shown in table 3 are broad categories of general case outcomes, and we recognize that they do not capture the subtleties of individual cases. As shown in table 3, in both district courts and COFC, small and non-small business protesters were unlikely to prevail. In both courts, injunctive relief was likely to be denied whether the protester was a small business or not. However, in some cases the court did not rule on the protester's motion for injunctive relief, or the agency voluntarily agreed to stay the performance of the procurement until the court ruled.

Table 3: General Case Outcomes for Bid Protest Cases Reviewed and Closed

General case outcome ^a	District courts		COFC	
	Total cases	Small business cases	Total cases	Small business cases
Court rulings on temporary injunctive relief^b				
Granted	7	3	11	6
Denied	34	22	47	26
Subtotal	41	25	58	32
Voluntary dismissals^c				
On motion of protester	15	8	11	5
On joint motion of protester and government	15	7	18	6
Subtotal	30	15	29	11
Court actions other than voluntary dismissals:^d				
Ruled in favor of protester	1	0	19	11
Ruled in favor of government	21	14	60	34
Other ^e	0	0	3	2
Subtotal	22	14	82	47

^aThe data in the table are based on data from unsealed case files; any data available on sealed cases (e.g., docket sheets); and information from attorney interviews (e.g., whether protester was a small business). The sum of the subtotals exceeds the number of cases reviewed because more than one court action may have been occurred in a case. For example, a court may have granted a protester's motion for temporary injunctive relief, and the protester and government subsequently filed a joint motion for voluntary dismissal based on a settlement agreement.

^bIncludes only those cases in which the court ruled on the protester's motion for temporary injunctive relief. In some cases, the court did not rule on the protester's motion for temporary injunctive relief, or the protester withdrew its motion after the agency voluntarily agreed to stay performance of the procurement until the court ruled on the merits of the case.

¹⁹ Ramcor Services Group, Inc. v. United States, 185 F.3d 1286 (Fed.Cir. 1999)

^cIn some cases in which the court dismissed the case upon the motion of the protester or upon a joint motion of the protester and government, the protester obtained some of the relief sought. For example, the government may have agreed to withdraw the solicitation, reconsider the protester's offer, or reconsider its application of a specific criterion used in evaluating the offer.

^dGenerally, these are cases in which the court ruled on motions for summary judgment or motions to dismiss (other than voluntary dismissals).

^eIncludes cases that do not fit the remaining categories, such as one COFC case in which the court ruled that it did not have jurisdiction and transferred the case to district court.

Source: GAO analysis of bid protest case files.

A number of cases were closed with the court granting a motion for voluntary dismissal either by the protester alone or by the protester and government jointly. In some of these cases, the protester may have received some of the relief sought. For example, the government agency may have agreed to reconsider its application of a specific criterion used in evaluating the offers it received. When the court ruled on actions other than motions for voluntary dismissal, both district courts and COFC were likely to rule for the government, although COFC ruled for small businesses in a greater proportion of cases (11 of 47) than did district courts (0 of 14).

Appendixes V (district courts) and VI (COFC) each include case summaries of 10 examples of bid protest cases each—filed by small businesses and 5 that were not filed by small businesses.

Limited Data on COFC's Judges Ability to Travel

Proponents of retaining district court jurisdiction assert that COFC judges may not be able to travel on short notice to hear bid protest cases filed by businesses outside of the Washington, D.C., area. COFC told us that its judges had traveled twice to hear a bid protest case during the period January 1, 1997, through August 1, 1999. The Chief Judge of COFC said that COFC judges could travel, if necessary, to hear cases.

Agency Comments and Our Evaluation

We sent a draft of this report for comment to the Public Contract Law Section of the American Bar Association, the Federal Bar Association, the Secretary of Defense, the Attorney General, and the Chief Judge of COFC.

The Attorney General had no comments on the report. In his written comments, the Acting General Counsel of the Department of Defense noted that the report's findings provided support for the Department's position that district court jurisdiction should be allowed to sunset.

The Chief Judge of COFC provided oral comments in a meeting on March 3, 2000. He noted that the report provided useful information on the characteristics of bid protest cases that had not been previously available. In reviewing the list of COFC cases we had reviewed, COFC's Clerk of

Court identified 14 additional bid protest cases that had not been previously provided to us. The Chief Judge asked that we include an analysis of these additional 14 cases in our final report, and we have done so. As a result, our final report includes an analysis of 118 COFC bid protest cases.

In his written comments, the chair of the American Bar Association's Section of Public Contract Law noted that (1) the report's findings confirmed that U.S. district courts remained an important judicial remedy in bid protest cases, (2) the limited case data available do not provide guidance as to the advantages and disadvantages associated with retaining district court jurisdiction, (3) the case data do not provide a sound basis on which to conclude that district court jurisdiction should be allowed to sunset, and (4) potentially troublesome jurisdictional issues could generate needless litigation should district court jurisdiction be permitted to sunset. The Chair also provided more extensive comments on the issue of allowing district bid protest jurisdiction to sunset that had been previously sent to us. Our report focused on an empirical analysis of the cases that have been filed in district courts and COFC since concurrent jurisdiction for bid protests took effect—data not previously available. With these data we were able to address many of the perceived advantages and disadvantages of filing in each judicial forum. However, as we noted in our report, some of the arguments for and against retaining district court bid protest jurisdiction are policy arguments that cannot be addressed using data from the case files.

The Chair of the Federal Bar Association's Government Contracts Section and the Chair of the Section's Working Group on the Sunset of U.S. District Court Bid Protest Jurisdiction provided as their comments a paper drafted by the Working Group that had previously been provided to us. In those comments, the Working Group concluded that district court bid protest jurisdiction may be desirable for a number of reasons. The Working Group also concluded that there are no clearly significant benefits to termination of the district courts' jurisdiction, but none of the factors it examined was grave enough to compel the conclusion that continued district court jurisdiction is absolutely necessary.

The comments of DOD, the American Bar Association, and the Federal Bar Association are included in appendixes VII, VIII, and IX.

We are sending copies of this report to Senator Orrin Hatch, Chairman, and Senator Patrick Leahy, Ranking Minority Member, Senate Committee on the Judiciary; Representative Henry Hyde, Chairman, and

Representative John Conyers, Ranking Minority Member, House Committee on the Judiciary; Senator Fred Thompson, Chairman, and Senator Joseph Lieberman, Ranking Minority Member, Senate Committee on Governmental Affairs; and to Representative Dan Burton, Chairman, and Representative Henry Waxman, Ranking Minority Member, House Committee on Governmental Reform. We also are sending copies of this report to the Honorable Janet Reno, Attorney General; the Honorable Loren Smith, Chief Judge, COFC; the Honorable Leonidas Ralph Mecham, Director, Administration Office of the U.S. Courts; the American Bar Association, Section of Public Contract Law; the Federal Bar Association, Government Contracts Section; and other interested parties. Copies of this report will be made available to others upon request.

Please contact me or William Jenkins on (202) 512-8777 if you or your staff have questions about this report. Major contributors to this report are acknowledged in appendix X.

A handwritten signature in black ink that reads "Richard M. Stana". The signature is written in a cursive, flowing style with a long horizontal stroke at the end.

Richard M. Stana
Associate Director
Administration of Justice Issues